LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 7 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 114

CARLO BIANCHI AND COMPANY, INC., *Petitioner*

v.

UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ROBERT F. BRADFORD
53 State Street
Boston, Massachusetts 02109
Attorney for Petitioner

WILLIAM H. MATTHEWS
821-15th St., N. W.
Washington, D. C. 20005
Of Counsel

May 7, 1965.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutory and contract provisions involved	2
Statement	3
Reasons for granting the writ	9
Conclusion	18
Appendix	1a

CITATIONS

CASES:

Associated Traders, Inc. v. United States, 144 Ct. Cl. 744	15
Bell Aircraft Corp. v. United States, 120 Ct. Cl. 398, aff'd 344 U.S. 860	14
Cramp Shipbuilding Co. v. United States, 122 Ct. Cl. 72	14
Securities & Exchange Commission v. Chenery Corp., 318 U.S. 80; 332 U.S. 194	14
United States v. Bianchi, 373 U.S. 509	3
Wunderlich et al v. United States, 117 Ct. Cl. 92, 342 U.S. 98	14

STATUTES:

Act of May 11, 1954, 68 Stat. 81 (Wunderlich Act) (41 U.S.C. 321-322)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

CARLO BIANCHI AND COMPANY, INC., *Petitioner*

v.

UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Carlo Bianchi and Company, Inc., prays that a Writ of Certiorari issue to review the judgment of the Court of Claims entered in this case on July 17, 1964.

OPINION BELOW

The opinion of the Court of Claims of July 17, 1964 (App., *infra*, p. 1a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 17, 1964. A timely petition for reconsideration and to vacate the judgment was denied on December 11, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

(1) Whether the United States Court of Claims properly exercised appellate jurisdiction in basing its decision upon determination of an issue of fact not presented to and not considered by the contracting agency below.

(2) Whether the United States Court of Claims properly exercised appellate jurisdiction in applying the substantial evidence rule, and thereby attaching finality, to the contracting agency's interpretation of government contract specifications as applied to admitted facts, a question of law.

STATUTORY AND CONTRACT PROVISIONS INVOLVED

1. The Act of May 11, 1954, 68 Stat. 81 (Wunderlich Statute) (41 U.S.C. 321-322) provides:

> 321. Limitation on pleading contract-provisions relating to finality; standards of review.
>
> No provisions of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> 322. Contract-provisions making decision final on questions of law.

> No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

2. The "Disputes" or "Finality-Clause" Article of the contract here involved provides:

> Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the contractor shall diligently proceed with the work as directed.

STATEMENT

The present case was heard by the Court of Claims on remand by this Court, confining its review to the administrative record under the standards in the Wunderlich Act (*United States* v. *Bianchi*, 373 U.S. 509).

The action arises out of petitioner's claim for its increased costs incurred in the course of constructing a 710-foot diversion tunnel which was part of a Government flood control dam project in upper New York State. The contract with the Army Corps of Engineers was entered into in 1946.

The specifications provided that prior to lining the tunnel with concrete, permanent tunnel protection in the form of steel supports was to be used to support the roof of the tunnel excavation for the first fifty feet from each end of the tunnel. The specifications pro-

vided that where the tunnel support was used, backpacking consisting of selected excavation material, with later grouting, was to be placed above the steel supports, and that the steel supports and the backpacking would remain embedded in the concrete lining after it was installed. The specifications also stipulated that where permanent tunnel protection in the form of steel supports was not required, no backpacking was to be used, but that overbreaks in these areas were to be backfilled with concrete at the time the concrete lining was placed.

The specifications also provided that the permanent tunnel protection was to be installed beyond the 50 feet from the portals where "required" or "directed" by the Contracting Officer (TP4-03, TP4-08, R.,[1] pp. 170, 171). Petitioner bid the job on the basis that additional tunnel protection would be directed if needed in order to successfully accomplish the placement of the concrete lining of the tunnel, and that petitioner would be compensated for such additional protection (R., p. 91). On account of the condition of the tunnel and the extensive rockfalls after it was holed through, petitioner installed the additional tunnel protection for the entire length of the tunnel. This suit is for the recovery of the extra expense incurred by petitioner by reason of the failure and refusal of the Contracting Officer to direct such installation.

The tunnel was holed through by March 12, 1947. Only a nominal amount of temporary tunnel protection had to be provided for the protection of the workmen during the course of the excavating. The tunnel was

[1] Reference is made to the portions of the administrative record before the Court of Claims set forth in the prior record in Docket No. 529, October Term 1962.

driven in cold weather and there were no rockfalls during the driving. The roof of the tunnel started to fall in during the clean-up work. Rockfalls were so bad that it was too dangerous for the clean-up crew to go back into the tunnel to remove rock which had fallen after they had performed the clean-up operations. Rock continued to fall from the tunnel roof until the time the steel supports were installed. The rockfall, totaling 203 cu. yds., was distributed in varying degrees throughout the tunnel (R., pp. 97, 105).

There was an exchange of correspondence between petitioner and the Resident Engineer in April of 1947. The petitioner pointed out the hazardous conditions existing in the tunnel as the result of the rockfall, and requested authorization to extend the permanent tunnel protection throughout the tunnel.

The position of the Resident Engineer and that of the Contracting Officer was that while some additional steel supports, with backpacking above, were necessary before the concrete lining could be accomplished, to provide protection against damage to completed work as well as to protect the workmen, it was "temporary protection" under the specifications and therefore would not be paid for (R., pp. 157-159, 245-249). They relied on the following provision of the specifications:

> TP4-02. TUNNEL EXCAVATION. *a. Scope*— The tunnel bore may be driven from either or both ends by any of the usual methods of tunneling, providing the driving is continuous and progress is consistent with that indicated on the progress schedule. Temporary tunnel protection shall be provided where required for safety of the workmen and shall be placed progressively after each heading blast and prior to resumption of excavation and drilling operations. . . . (R., pp. 169, 170)

Petitioner appealed the decision of the Contracting Officer, rendered May 5, 1947, to the Board of Claims and Appeals of the Corps of Engineers. On August 11, 1947, the Contracting Officer authorized the installation of the steel supports as "temporary" tunnel protection under the specifications, the cost to be borne by petitioner. (R., pp. 253, 254) The petitioner proceeded promptly to make the installation.

At the hearing before the Board, in June 1948, the Government's expert witness Mr. McGavock, on whose testimony the Board's findings were based, took the same position as that of the Resident Engineer and Contracting Officer. This witness inspected the tunnel in June 1947 and rendered his report the month following. According to his report, he observed only 300 feet of the tunnel interior. This was because of the depth of the water in the remainder of the tunnel. He observed three areas of major rockfalls extending a cumulative distance of about 100 feet, which he admitted required tunnel supports in the form of steel ribs with wooden lagging and metal plates, and backpacking above the lagging, before concreting could be accomplished (R., pp. 135, 136, 138, 141, 142). He agreed that the purpose of the steel supports, which he limited to 100 feet of protection, was to prevent rock movement that would damage the concrete before it had a chance to harden (R., 142, 148). He admitted that the steel supports, with lagging and backpacking above them, had to remain embedded in the concrete because it was too dangerous to the work as well as to the workmen to remove them (R., 142, 149). Nevertheless, like the Resident Engineer and the Contracting Officer, he took the position that the provision in the contract for temporary tunnel protection, which

was required only for the safety of the workmen and only during the operation of tunnel excavation, imposed an obligation on the part of the contractor to provide protection against damage to completed work as well.

One of the main issues before the Board and the Court of Claims was whether the type of tunnel supports which the Government's expert witness admitted was required in a limited area of the tunnel, similar to what was installed eventually by the petitioner, should be construed as temporary tunnel protection under Section TP4-02 of the specifications or permanent tunnel protection as provided in Section TP4-03. Engineering measurements of the rockfalls from the roof of the tunnel taken in each 30-foot Monolith section, substantiated by photographs of the rockfalls, established that there were ten areas of rockfalls characterized by the Government expert witness as major rockfalls and many lesser rockfalls.

On remand, the Court of Claims referred the present case to a Commissioner for his determination. The Commissioner found that the Findings of Fact and Decision of the Board were unsupported by substantial evidence. The primary basis for the Commissioner's determination was that the steel supports with backpacking above, which the Government's expert witness indicated had to be installed in a limited area of the tunnel prior to the placement of the concrete lining, were for the protection of the work as well as for the protection of the workmen, and that they could not possibly be construed under the specifications as temporary protection, but that, once installed, they became and forever remained permanent protection. In this connection, according to the Commissioner's

interpretation of the contract specifications, (1) the temporary protection provision of the contract only required the petitioner to install temporary support of whatever kind it felt necessary in order to excavate the rock in the tunnel; (2) the use of the word "temporary" as defined in Webster's Dictionary is not meant to apply to any form of permanent protection; (3) the contract drawings show that where steel supports were to be used they were to be embedded within the concrete lining; as to the balance of the tunnel, where permanent tunnel protection was not provided, the contract drawings show that the concrete lining extended up to every irregular face of the tunnel rock; in other words, that all overbreak was to be backfilled with concrete making the backfilling a part of the tunnel lining operation; (4) there is no requirement in the contract specifications that petitioner take any measures after the holing through of the tunnel to keep the roof from falling in within the tunnel, except to place the tunnel lining as promptly as possible; (5) the implication in the specifications is that if the condition of the tunnel interior was such that support would be needed, it would be authorized as a pay item. The Commissioner also found that the engineering computations of the rockfall in the tunnel and the photographic exhibits before the Board showed that extensive rockfalls occurred throughout the length of the tunnel, which necesssitated the installation of the permanent tunnel protection before concreting because of the threat of rock falling into wet or uncured concrete.

REASONS FOR GRANTING THE WRIT

(1) The decision below is based upon the Court of Claims determination of a factual issue not presented to and not considered by the Claims and Appeals Board. The Court properly states that the critical issue is whether it was necessary for petitioner to install steel supports throughout the length of the tunnel. However, in resolving that issue, the Court states in substance that no recovery is proper unless the steel supports were required for the permanent support and maintenance of the tunnel. (App., p. 11a, 3rd par.). This issue was never before the Board. There the issue was whether or not it was necessary to install the permanent steel supports before the concrete lining of the tunnel could be accomplished, as indicated by petitioner's counsel in his opening statement before the Board:

> ... Mr. Fox (the Government attorney) has clearly stated the position of the appellant to this extent that the appellant has lined this entire tunnel with steel liner plates and appears before this Board asking in equity and good conscience that it be reimbursed by the Government for the installation of these steel liner plates which the contractor felt were absolutely necessary in order to line this tunnel and complete the tunnel job because of the character of the rock that was encountered ... We ask that we be paid for the work which we say was absolutely necessary and without which this tunnel could not have been lined with concrete as required. (R., pp. 79, 83).

According to the government's own expert witness, if steel supports were not installed before concreting in the area of major rockfalls, the tunnel could not have been successfully lined with concrete "without danger

to personnel or *structure*" (emphasis supplied) (R., p. 142). The testimony of this witness establishes that the steel supports he deemed necessary for a limited area were for the purpose of preventing rock movement that would damage the concrete before it had a chance to harden (R., p. 148). Testimony of the government's design engineer clearly indicates that once the concrete was installed and hardened, that alone would adequately support any load that could possibly come on it from the roof of the tunnel (R., p. 134).

No witness before the Board indicated that the steel supports were necessary for the permanent support of the tunnel. Nor did the Board decision. As a matter of fact, the Government design engineer testified in a positive manner that at the end sections of the tunnel, where the plans called for the installation of permanent tunnel protection, the 1 foot-3 inch thickness of reinforced concrete tunnel lining was sufficiently strong to take care of any load which would occur on these ends without using in any way the protection work in the form of steel ribs and plates. The Government design engineer further testified that, within the mid-section of the tunnel, the concrete tunnel lining was designed for sufficient strength to make the rock above the tunnel completely stable, and that the roof would be supported by the concrete without the necessity for any type of tunnel protection. (R., p. 129.)

The Court below seems to rely in part on the testimony of Mr. Mather, the Resident Engineer, in support of its assertion that, in order to recover, petitioner must establish that the steel supports were required for the permanent support of the tunnel. The Court decision states, referring to his testimony: "He testified that the contract required steel lining only where

necessary for the support of the tunnel on a permanent basis." (App., p. 9a). This was not Mr. Mather's testimony. Had he expressed that opinion it would have been entitled to no credence, because no such provision is contained in the contract, and also because of his very limited experience in tunnel roof construction, and the fact that he did not profess to be a design engineer. (R., pp. 150, 151). This witness stated that he refused to authorize permanent tunnel protection because his interpretation of the specifications was that the protection required was "temporary protection", and that it was the responsibility of the contractor to place it for the protection of his workmen. Another statement attributed to Mr. Mather was one which he made to the sub-contractor's engineer in direct charge of the tunnel excavation work that the only time tunnel protection would be used would be to prevent the failure of the tunnel itself. (R., p. 113). This obviously refers to the failure of the tunnel during the course of construction, and not to the maintenance or permanent support of the tunnel.

The Court of Claims bases its declaration that the central issue was whether the steel supports were necessary for the maintenance or permanent support of the tunnel, and its disposition of this issue in favor of the respondent, primarily on its reference to the "permanent tunnel protection" and "temporary protection" provisions (TP4-03, TP4-02) of the specifications. (App., p. 11a). The Court concludes:

> . . . Had the contract contemplated payment for supports designed only to protect the workmen while the job was being completed, it seems reasonable to suppose that TP4-08, or some comparable paragraph, would have made this express. (App., pp. 11a, 12a)

The above statement indicates that the Court mistakenly believed that the steel supports were installed by petitioner in the mid-section of the tunnel only to protect the workmen while the job was in progress. This is not so. As indicated by the testimony of respondent's expert witness, Mr. McGavock, *supra* p. 6, the purpose of the steel supports was to make it possible to install the concrete lining without danger to the structure, in order to protect it from rupture by falling rock during its installation and during the subsequent period of hardening, as well as without danger to the workmen. Nor is there any conceivable conflict on this basic issue between the testimony of Mr. McGavock and that of petitioner's expert witness, Mr. Crosby, quoted in the decision below. (App., p. 10a). Following the Contracting Officer's interpretation of the specifications that the "temporary protection" provision of the contract, imposed on petitioner the obligation to provide protection against damage to the tunnel structure as well as for the safety of the workmen, respondent's expert witness took the position that the steel supports he recommended were temporary protection even though the steel supports, with backpacking above, had to forever remain embedded in the concrete, *supra,* pp. 5, 6. Completely ignored was the fact that under paragraph TP4-02 temporary protection was required by the contract solely for the protection of the workmen, and only during the process of tunnel excavation.

The contract specifications provided that the permanent tunnel protection be installed beyond the 50 feet from the portals where "required" or "directed" by the Contracting Officer, *supra,* p. 4. It was conceded by respondent's design engineer that the words "required" or "directed" were inserted in the specifica-

tions to cover the possibility that conditions would be encountered at the tunnel site differing from those reasonably to be expected, and which would require the installation of the steel supports beyond the 50 feet from the tunnel portals (R., p. 133). This testimony confirms the reasonableness of the basis on which the contract was bid, that additional tunnel protection would be directed before concreting if needed, *supra*, p. 4.

The holding of the Court of Claims that no recovery is proper unless it can be said that the steel supports were required for the permanent support of the tunnel is in direct violation of the engineering design of this tunnel, and it imposes on petitioner a burden of proof for which there is no warrant in the record, or in the decision of the Board. The Court states:

> We find it impossible to say that the Board could not properly conclude that the steel ribbing and plates were not required for the *continued* support of the tunnel (emphasis supplied) (App., p. 12a, line 5)

Nowhere does the Board decision indicate any conclusion on its part that the tunnel supports which petitioner installed lost their essentially permanent character merely because they did not fulfill the function of providing continuing support of the tunnel structure, which means support after the completion of the work. Nor was this function contemplated or required under the contract.

Petitioner submits that the decision of the Court below is fundamentally erroneous because it is based upon a determination of the issue whether the steel supports were necessary for the permanent support of the tunnel, an issue not presented to and not considered

by the Board. Judicial review is limited to the issues presented to the administrative agency. In *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943), the first *Chenery* case, this Court states. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based". In the second *Chenery* case, 332 U.S. 194, 196 (1947), this Court amplified its previous statement:

> When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the Court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

(2) The decision below applied the substantial evidence rule, and thereby attached finality, to the contracting agency's interpretation of the specifications as applied to admitted facts, a question of law.

The Wunderlich Act permits finality for administrative decisions only on questions of fact, as distinguished from questions of law, *supra*, pp. 2, 3. Generally, questions of interpretation of contracts are not "questions of fact" within the meaning of that expression as it is written into disputes articles of government contracts, but are questions of law to be decided by the Court. *Wunderlich et al* v. *United States*, 117 Ct. Cl. 92, 212-214, reversed on other grounds 342 U.S. 98, and cases there cited; *Bell Aircraft Corp.* v. *United States*, 120 Ct. Cl. 398, affirmed 344 U.S. 860; *Cramp*

Shipbuilding Co. v. *United States,* 122 Ct. Cl. 72, 97; *Associated Traders, Inc.* v. *United States,* 144 Ct. Cl. 744, 750-751.

The Claims and Appeals Board interpreted the "Temporary Tunnel Protection" provision (Par. TP4-02) of the specifications as embracing any steel supports with backpacking above, which are needed to protect the structure of the tunnel in the course of the installation of the concrete lining, even though both the steel supports and backpacking had to remain embedded in the concrete forever. This interpretation is implicit in the Board's finding that:

> . . . Vertical joints encountered at three central locations representing less than 100 feet of tunnel length could have been supported with relatively little temporary protection. (R., p. 176),

when considered with the admission of respondent's expert witness that the steel supports he deemed necessary, similar to what were installed by petitioner,[2] were for this purpose and met these tests.

---

[2] The Contracting Officer by letter of 13 June 1947 (Exhibit N before the Board, R., p. 248) recommended that adequate protection would be obtained by using throughout the length of the tunnel steel I beam ribs of about 3 inches and 6 lb. weight, spaced 4 to 8 feet apart, with two-inch timber lagging. This was in lieu of the contractor's recommendation that the same size steel ribs and liner plates as were prescribed and used at the portals be used throughout the central portion of the tunnel. The Contracting Officer took the position that this type of installation was considered an overdesign for the purpose required, and therefore would be more costly than he considered necessary. He recognized and admitted the necessity for support throughout the entire length of the tunnel. The type of tunnel protection recommended by the Contracting Officer is in its very make-up identical with that contemplated under paragraph TP4-03 "Tunnel Protection" in the contract specifications. Nevertheless, he interpreted the specifications by characterizing it as "temporary".

The Board preceded the above finding by quoting the contract provisions for Temporary Tunnel Protection and for Permanent Tunnel Protection, commenting on these provisions. (R., pp. 169-173). The Board's conclusion that only "temporary tunnel protection" was required necessarily involved an interpretation of these provisions of the specifications, as applied to admitted facts. Petitioner submits that this was a question of law.

The Court of Claims applied the substantial evidence rule to the Board's interpretation of the specifications in the following language:

> . . . the critical issue remains the necessity for steel supports throughout the length. On that question the Board's conclusion that "vertical joints encountered at three central locations representing less than 100 feet of tunnel length could have been supported with relatively little temporary protection", seems buttressed by substantial evidence. (App., p. 12a, 1st full par., line 8)

The decision below upholds the Board on the ground that there was a conflict in the testimony of petitioner's and respondent's expert witnesses which the Board had a right to resolve in favor of respondent. (App., p. 11a). The decision properly states that the critical issue is the necessity for steel supports throughout the length of the tunnel. However, confining this critical factual issue to the 100 feet of tunnel protection, apart from the question of interpreting the specifications, there is no conflict whatsoever between the testimony of any of petitioner's and respondent's witnesses. In limiting the tunnel protection installed to Mr. McGavock's 100 feet no question of fact is involved, but

only a question of law which can be resolved within the four corners of the specifications.

If petitioner's contention that the steel supports which respondent's expert deemed necessary constituted permanent tunnel protection rather than temporary protection, under the specifications, be sustained, the only remaining real issue is how much additional tunnel protection, other than the respondent's expert's 100 feet, was required before the concrete lining of the tunnel could be accomplished. Although the words "permanent tunnel protection" do not appear in the contract or the specifications, the issue before the Contracting Officer and before the Board was whether "permanent tunnel protection" under paragraph TP4-03, or "temporary tunnel protection" under paragraph TP4-02 of the contract specifications, was required throughout the length of the tunnel before it would be possible to line it with concrete. That this was the issue is apparent from the opening statements of counsel for both parties, from the testimony and exhibits of record, and from the decision of the Board (R., pp. 77-81, 153-161, 171-176).

The Court of Claims disposes of the issue of how much additional tunnel protection was needed, over and above Mr. McGavock's 100 feet, by concluding that rockfall in the downstream half, uninspected by Mr. McGavock, could have been averted by scaling. (App., p. 12a) This conclusion is based on the Court's comparison of total rockfall in five 30-foot Monoliths with three such Monoliths in the upstream half of the tunnel, which is in effect the expression of an expert opinion for which there is no warrant in the record. Had respondent's expert witness expressed this opinion, and had petitioner been deprived of the right of cross examination or rebuttal, this would have been a serious error.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari be granted.

ROBERT F. BRADFORD
53 State Street
Boston, Massachusetts 02109
Attorney for Petitioner

WILLIAM H. MATTHEWS
821-15th St., N. W.
Washington, D. C. 20005
Of Counsel

May 7, 1965.

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 466—54

(Decided July 17, 1964)

CARLO BIANCHI AND COMPANY, INC. v. THE UNITED STATES

William H. Matthews for plaintiff. *Robert F. Bradford* on the briefs.

Gerson B. Kramer, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Before JONES, *Senior Judge*, REED, *Justice (Ret.)*, sitting by designation, LARAMORE and DURFEE, *Judges*.

Opinion

REED, *Justice (Ret.)*, sitting by designation, delivered the opinion of the court:

In 1946 the plaintiff contracted with the government to construct a flood control dam in upstate New York. Incident to the project was the construction of a tunnel 710 feet long with a diameter of 13 feet after concreting. The contract called for steel ribs and liner plates to be installed as tunnel support in the 50 feet at each end of the tunnel. No other protection than the concreting was provided for the central 610 feet. Plaintiff deemed it necessary to provide steel support for the entire length. This suit is for the large additional expense allegedly involved in installing ribs and liner plates beyond the 50 feet at each mouth.

The plaintiff's request for authority to use permanent steel supports throughout was first presented by letter to

the contracting officer in April 1947, before the supports had been installed. The officer refused to authorize the additional expense on the grounds that the contractor had been furnished full information as to rock conditions at the tunnel site, that the contract limited steel support to one hundred feet, and that the contract placed the cost of protection of the safety of workmen during construction on the contractor. An appeal was taken to the Board of Claims and Appeals of the Corps of Engineers. While that appeal was pending the plaintiff installed the supports for which compensation was claimed.

In June 1948 the Board held a hearing and in December of that year it rendered its decision denying plaintiff's claim.[1] In 1954 plaintiff timely instituted this action in this court. In this suit, varying the claim presented to the Board for estimated costs of installing the support, plaintiff requested a total of $233,425.25 costs allegedly incurred as a consequence of the government's refusal to authorize support throughout the tunnel. The primary issue here, too, is the necessity for the additional support. Plaintiff does not contend that this issue is not one of "fact" under the standard "Disputes Clause" in plaintiff's contract:

> "Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

---

[1] The Board's decisions are not officially reported. The opinion is to be found in the printed record in the Supreme Court, *Carlo Bianchi* v. *United States*, 373 U.S. 709, Record p. 166.

As the claim was presented under this clause, the suit is governed by the "Wunderlich Act," 41 U.S.C. §§ 321-322 (1958), which provides that the Board's decision on matters covered by the Disputes Clauses "shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." The case was sent to a Commissioner who conducted a second hearing admitting evidence not presented to the Board. The Commissioner recommended that plaintiff recover. This court accepted the Commissioner's findings and conclusions, 144 Ct. Cls. 500, and, after receiving additional evidence on the question of damages, entered judgment for plaintiff. 157 Ct. Cls. 432 (May 9, 1962).

The Supreme Court reversed, 373 U.S. 709 (1963), holding that the Wunderlich Act prevents de novo consideration by a court where an administrative determination has been made. Rather the Supreme Court held the reviewing court is limited to a determination whether there is substantial evidence, based on the record developed before the Board, to support the administrative conclusions.

The case was again sent to the Commissioner after remand from the Supreme Court decision. The Commissioner, after examining the record of the Board hearing, concluded that the Board's finding for the government was not based on substantial evidence.[2] The parties are agreed that under the Wunderlich Act our scope of review is the same as that exercised by the federal courts of appeals under the Standards of *Universal Camera Corp.* v. *Labor Board,* 340 U.S. 474, and its progeny.[3]

---

[2] Commissioner's Determination Pursuant to Court's Order of July 12, 1963, upon Remand from the Supreme Court of the United States, filed November 4, 1963.

[3] Pl. Br. 40-45; Def. Br. 7-10.

The task before this court under the Supreme Court decision is to review the determination of the Board of Claims and Appeals of the Corps of Engineers and decide whether there was substantial evidence in the record as a whole before that Board to justify its conclusion. In reaching our conclusion, we cannot disregard plaintiff's evidence. However, even though we might have decided as an original matter with plaintiff on balance, the decision of the Supreme Court requires us to go further and uphold the Board's decision if there was substantial evidence to support the Board's decision on the record as a whole.

Plaintiff and defendant are agreed that the original contract called for steel ribbing only in the 50 feet of the tunnel nearest to each end. Plaintiff contends, however, that the condition of the rock was such that steel ribs and liner plates were required throughout the tunnel. Accordingly, plaintiff contends that recovery should be granted under paragraph TP4-08 of the specifications, which provides that "Payment for all costs of furnishing and placing liner plates, and tunnel supports, * * * specified herein or directed by the Contracting Officer, will be made at the applicable unit price * * *." Plaintiff contends that the evidence establishes that the officer should have directed the installation of the liner plates and ribs involved, and therefore that the government should pay for the support. Plaintiff also points to TP4-03, which provides:

> "TP4-03. Tunnel Protection.—a. Scope.—The tunnel protection shall be furnished and placed as required for distances of approximately the first 50 feet at each end of the tunnel which includes the underground portion of the outlet transition. Such tunnel protection conforming to the cross-sectional shape of the tunnel and transition, shall consist of steel arch ribs and corrugated steel liner plates as indicated on the drawings *or required,* including tie rods and spreaders. * * *" [Italics supplied]

As an alternative theory, plaintiff argues that the condition of the rock was sufficiently different from that revealed by test borings to show the supports became necessary by virtue of changed conditions within the meaning of Article 4 of the contract:

> "Article 4. *Changed Conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The Contracting Officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall with the written approval of the Secretary of War or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions."

The Board rejected plaintiff's contention that it had encountered changed conditions. The Board held that the testimony indicated that the job could have been completed with the aid of temporary supports at vertical joints in the rock. Under the contract "temporary" supports are not to be computed as pay items. It was further thought that plaintiff's delay from the holing out in March until December 1947 when the concreting was started had contributed to the rockfall that had occurred in the tunnel, and that the rockfall after the holing out was not excessive. The Board also found that the failure to undertake concreting promptly and air slaking due to the failure to seal up the tunnel were the cause of what it termed "gradual deterioration" of the rock.

The Commissioner found these conclusions unwarranted. First, the conclusion that "temporary" supports would be adequate for the protection of the workmen was rejected. The Commissioner apparently took the position that because backpacking would be used even with wooden lagging, and the backpacking would ultimately be encased in concrete when the tunnel was grouted, such support could not be deemed "temporary" under the specifications. Further, the photographs introduced by plaintiff showed substantial amounts of rockfall in the period shortly after the tunnel was holed out. The Commissioner agreed with the plaintiff that this demonstrated the threat of rockfall into wet or uncured concrete if the grouting had been undertaken immediately. And last, the Commissioner disagreed that the plaintiff had contributed to the rockfall by failing properly to seal up the tunnel while awaiting the grouting process. The Commissioner held that the provision of the contract that the tunnel shall be "adequately lighted and ventilated" prevented any sealing to prevent temperature and humidity changes from causing rockfall. Further, he thought the actual rockfall was to a large extent in pieces too large to have been caused by air slaking.

We are unable to agree with the Commissioner that the Board's conclusions were unsupported by substantial evidence. The plaintiff, in order to recover, must establish either that changed conditions were encountered within the meaning of Article 4 quoted above, or that the permanent steel ribs and liner plates were necessary to the completion of the tunnel and therefore should have been directed by the contracting officer under paragraph TP4-08. We do not consider the view of the Commissioner that the failure to seal up the tunnel is an inadequate basis for denying recovery on the evidence adduced before the Board. We hold that the Board was warranted in finding that no changed conditions were encountered necessitating the support and that the contracting officer was not required under the circumstances to direct the installation of steel ribs and liner plates throughout the tunnel.

The testimony before the Board consisted of the views of four witnesses for the plaintiff and three for the government.

Thomas A. Coyne, the plaintiff's general superintendent, testified that the nature of the rock did not change as the tunnel was dug deeper. Vertical joints in the rock appeared every 3 to 5 feet. Earlier test borings had not revealed these joints because no borings had been made at an angle. Because of winter weather, the grouting was not started as soon as the tunnel was holed out. By April the roof of the tunnel had started to fall and by August the volume of fallen rock had reached 203 cubic yards. Temporary supports would not have been feasible because it would not have been practicable to remove the backpacking that would have been necessary. The contractor would have been required to encase the backpacking in concrete during the grouting process. Mr. Coyne had had no prior experience in tunnels of this length.

Elford H. Richardson, plaintiff's chief engineer, testified that there was no data as to the dates on which the rock fell, but that over the entire March to August period some 203 cubic yards fell, including some that had to be trimmed for the installation of liner plates.

Everett Diehl, the chief engineer of the subcontractor that excavated the tunnel, testified that weakness in the roof had been noted from the outset. Steps were taken in blasting to avoid causing rockfall, and the tunnel was holed out without incident. The rockfall between March 12 and the end of the clean-up on March 25 was approximately 60 cubic yards in Mr. Diehl's estimation. The total volume of the excavation was 6,000 cubic yards. Mr. Diehl could not estimate whether 3% (203/6000) was an excessive fall because he had had no prior experience in unsupported tunnels of this length. Mr. Diehl also testified that the resident engineer told him at the time of the excavation that the only circumstance under which permanent support would be authorized would be if it became necessary to prevent the

collapse of the tunnel bore, i.e., to prevent the failure of the tunnel itself.

Irving B. Crosby, plaintiff's consulting geologist, testified that he visited the dam in April 1948. At that time the tunnel was largely lined with concrete, but some 140 feet were unlined. The steel ribs and liner plates were installed throughout. The liner plates were so installed that Mr. Crosby could see "almost to the crown of the roof." Mr. Crosby expressed the view that the rockfall was chiefly due to the fracturing of the rock. The rock contained parallel systems of fractures intersecting at more or less right angles. These fractures were not indicated on the contract drawings and there was no way of knowing that the roof conditions would be so bad. If no support was provided, it would have been likely that rock would have fallen through the wet concrete.

The first government witness was David C. Congleton, chief of the Dam Design Section of Baltimore District. He had had some 15 years experience in tunnel construction. He testified that no likelihood of rockslide was seen except at the ends of the tunnel where the 50 feet of permanent steel supports were provided. It was assumed that the roof would stand without further support once the concrete lining was installed.

C. B. McGavock, Jr., a geologist with the Baltimore District, testified that he examined the tunnel in June 1947, before the support was installed. He estimated at the time that he examined "the upstream half" of the tunnel, but did not see the remainder of the tunnel because of water. He later testified before the Board that he examined all but about 200 feet. He stated that the rockfall was largely in three areas comprising about 100 feet in total. These areas were where intersecting joints occurred at particularly acute angles. Some form of "temporary" support would be necessary in these places, but as to the remainder of the tunnel there was no reason why it could not safely be grouted without support. Scaling with the jumbo would

be necessary. Mr. McGavock also expressed the view that if the tunnel had been sealed up to prevent outside air from entering during the period after the cleaning up, much of the expansion causing the rockfall that did occur would not have taken place.

The last witness was Donald E. Mather, the government's resident engineer on the project. He testified that the contract required steel lining only where necessary for the support of the tunnel on a permanent basis. Support necessary for the workmen while concreting was the responsibility of the plaintiff under TP4-02.[4] He also expressed

[4] "TP4-02. *Tunnel Excavation.* a. Scope. The tunnel bore may be driven from either or both ends by any of the usual methods of tunneling, provided the driving is continuous and progress is consistent with that indicated on the progress schedule. Temporary tunnel protection shall be provided where required for safety of the workmen and shall be placed progressively after each heading blast and prior to resumption of excavation and drilling operations. The tunnel shall be maintained free of water by means of drains and sump pumps. Tunnel dust shall be kept under proper control by wet drilling and sprinkling. The tunnel shall be adequately lighted and ventilated. Only electric or air motorized equipment shall be used in the tunnel. An adequate power supply shall be available at all times. All rock projections inside the tunnel neat line shall be removed and overbreak beyond the tunnel pay line shall be backfilled with approved material, compacted to the required density without cost to the Government. Where and as the arch ribs and liner plates are placed to the designated grade and alignment, the overbreak voids at the crown and haunches shall be progressively backpacked with selected tunnel excavation in a way that will hold the completed tunnel protection on line and grade. Where such tunnel protection is not required all overbreak beyond the tunnel pay line shall be backfilled with concrete. Such work shall be done together with placing of the concrete tunnel lining. After the concrete tunnel lining is in place and prior to tunnel and collar grouting the entire length of the tunnel shall be grouted at a pressure not to exceed five pounds to complete filling remaining overbreak voids. Such grouting including furnishing and placing of grout pipes will not be paid for as a unit and all costs shall be included in the contract unit price for tunnel concrete lining. Disposal of tunnel excavation shall be in accordance with subparagraph TP3-Old."

the view that there was no need for any permanent protection. Temporary protection was probably necessary in some parts of the tunnel where the roof was weak. He testified that the rockfall that occurred was not unusual. If he had found unstable rock in the middle of the tunnel similar to that at the portals he would have authorized steel ribs and liner plates.

It appears to us that it cannot be said that the Board's decision was without substantial support in the record. Whether the steel ribs and plates were necessary for the maintenance of the tunnel was the central issue. On that question Mr. Crosby testified for the plaintiff and Mr. McGavock for the government. Both men were qualified geologists. They disagreed on the cause of the rockfall—Crosby attributing it largely to ground water and McGavock to expansion from contact with the air. But McGavock's unequivocally expressed judgment was that only temporary support was necessary at three areas of major rockfall. Crosby does not directly controvert this judgment. The strongest statement that he made was in the following excerpt:

> "McCarron [plaintiff's counsel]: Will you tell us whether or not, in your opinion, the contractor could have lined this tunnel without the use of some form of permanent tunnel support, having in mind the character of the rock, without destruction or damage to the concrete lining?
>
> Crosby: You mean, could he have lined it without leaving some support in there?
>
> McCarron: Assuming no support was provided at all, would it have been possible for him to line it with concrete without having falling rock?
>
> Crosby: I think in some cases they might have gone through the concrete and crashed to the floor which would have left voids in the concrete which would have been exceedingly detrimental to the permanent safety of the tunnel."

It appears that Crosby did not express his views on the necessity of the type of support, temporary or permanent, steel or some less expensive substitute, but rather that he at best expressed the view that some sort of support was necessary. It is not clear whether that support was thought necessary while the concrete was hardening or whether it was deemed necessary for the permanent support of the tunnel.

We have here a conflict in testimony by witnesses shown to have had enough knowledge of tunnel construction to make them competent to express conclusions as to the necessity for extension of the steel supports beyond the distances called for by the contract. It is situations such as this that call for the application of the rule that where there is substantial evidence to support varying decisions, the conclusion of the Board of Claims and Appeals of the Corps of Engineers must stand.

That the backpacking would be encased in concrete after the grouting does not, in our view, render the support "permanent" rather than "temporary." The specifications contemplated that the contractor bear the burden of "temporary" support "for the safety of workmen." The inference seems plain that the contractor was left to its own devices to protect its men in the course of the construction. The support for which the government agreed to pay was that which was necessary to the maintenance of the tunnel. Unless it can be said that the steel ribs and plates were required for the permanent support of the tunnel, no recovery is proper.

This interpretation seems inescapable to us when the provision of TP4-03, referring to "tunnel protection" and specifying steel ribs and plates in the 50 feet at each end, is compared with TP4-02, dealing with the excavation procedure and calling for "temporary tunnel protection * * * where required for the safety of workmen."

The latter form of support is not compensable, while the former is, under TP4-08. Had the contract contemplated

payment for supports designed only to protect the workmen while the job was being completed, it seems reasonable to suppose that TP4-08, or some comparable paragraph, would have made this express.

We find it impossible to say that the Board could not properly conclude that the steel ribbing and plates were not required for the continued support of the tunnel. The Board's views on the cause of the rockfall that occurred from March to August do not constitute the basis of our affirmance. Whether the fall was due to the contact with the open air or not, and whether or not plaintiff should have sealed the tunnel while no work was underway, the critical issue remains the necessity for steel supports throughout the length. On that question the Board's conclusion that "vertical joints encountered at three central locations representing less than 100 feet of tunnel length could have been supported with relatively little temporary protection," seems buttressed by substantial evidence.

Plaintiff urges that the testimony of their Mr. Richardson, as well as photographic evidence, shows that there were 9 or 10 areas of major rockfall. Accordingly, plaintiff contends that the view of Mr. McGavock, the government's geologist, that there were three areas covering less than 100 feet requiring temporary support is untenable. But as McGavock testified, he entered only one-half of the tunnel. As such, his testimony would be expected to relate only to one-half. An examination of the rockfall by area in the tunnel shows that plaintiff's own data shows three monoliths in the upstream half of the tunnel, each 30 feet of tunnel length, at stations 25+74, 26+04, and 26+34, with rockfall above 5 cubic yards. There are 5 such monoliths in the downstream half, uninspected by McGavock, but these show a total rockfall about equal to that in the three upstream monoliths. It does not appear to us to be demonstrated that the lesser rockfall in the other areas could not have been averted by scaling, or was even dangerous. Again we must conclude that the question presented to the Board was one calling

for the exercise of judgment and one on which we may not substitute our guess for the conclusion of the administrative body.

Plaintiff also suggests that the Board could not accord greater credence to McGavock's testimony than to Crosby's. McGavock entered only one-half the tunnel. Further, in a contemporaneous report he stated that the bedrock was "thin bedded, hard gray sandstone * * * with interspaced partings and zones of black, fissile shale." Before the Board McGavock described the rock as "shale of the mechanical sedimentary type." Plaintiff suggests that because of this discrepancy, McGavock's testimony must be discredited. We do not agree. Nothing was made of this point on cross examination. As we are not geologists, the extent or import of the asserted discrepancy is at best obscure. We cannot say that the Board was compelled to disregard McGavock's opinion on this basis.

It is pertinent that Crosby's testimony is also subject to some skepticism in that he entered the tunnel for the first time in 1948 when all but 140 feet had been lined with concrete and steel ribs, and liner plates had been installed throughout the tunnel.[5]

The last issue in the case, whether the Board was warranted in concluding that there were no changed conditions, seems to us to fall equally into the area reserved to the administrative agency. The government produced testimony by McGavock that anyone familiar with the area and the type of rock should know that there would be joints throughout the rock. Crosby testified that the fracturing system could not be anticipated to be so bad. The borings did not reveal the joints for the obvious reason that they were taken only vertically, i.e., parallel to the joints themselves. Again this seems to be an issue on which there was conflicting expert opinion. Plaintiff does not raise any

---

[5] See note 1 above and page 120 of the printed record referred to therein.

specific refutation of McGavock's testimony and therefore we cannot say that the Board was without support in adopting McGavock's view over Crosby's.

Furthermore, the issue, even if the rock fracturing were unable to be anticipated, remains whether the changed condition required the installation of the steel supports. On that issue, as we have stated, we find the Board's conclusions adequately supported.

The purpose of the adoption of the rule of the Wunderlich Act, submitting determinations of technical disagreements between parties to government contracts to boards familiar with the subjects of such contracts, was to have determinations by experts. No charge of fraud arises in this case. The conclusion of the Board has substantial support in the record as a whole and must be upheld. Judgment is entered for the defendant and plaintiff's petition is dismissed.

CONCLUSION OF LAW

Upon the foregoing opinion which includes therein the findings of fact made by the court as a part of its judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and its petition is therefore dismissed.

DAVIS, *Judge,* took no part in the consideration and decision of this case.